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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ABEL SOTO,

Defendant and Appellant.

B203546

(Los Angeles County
Super. Ct. No. YA064697)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Francis J. Hourigan, III, Judge. Affirmed.

Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Jaime L. Fuster, and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Abel Soto appeals from a judgment entered after a jury found him guilty of count 1, first degree murder (Pen. Code, § 187, subd. (a)),¹ count 4, assault with a firearm (§ 245, subd. (a)(2)), and count 5, assault with a firearm (§ 245, subd. (a)(2)). The jury found true the allegations that appellant personally and intentionally discharged a handgun, causing great bodily injury within the meaning of section 12022.53, subdivision (d), as to counts 4 and 5, and that the acts were committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1)(C), as to counts 1, 4, and 5.²

The trial court sentenced appellant to a total of 72 years eight months to life as follows: as to count 1, the trial court ordered appellant to serve 25 years to life plus an additional 25 years to life for the firearm enhancement. As a result of the section 186.22 finding, appellant was deemed ineligible for parole for at least 15 years. As to count 4, the trial court sentenced appellant to three years midterm plus four years midterm for the gun allegation and 10 years for the gang allegation, for a total of 17 years. As to count 5, the trial court sentenced appellant to one year (one-third the midterm) plus one year four months for the gun allegation and three years four months for the gang allegation, to be served consecutive to count 4.

We affirm.

CONTENTIONS

Appellant contends that (1) there was insufficient evidence as a matter of law that he shot Jose Robles (Robles) and assaulted Andres Sandoval (Sandoval) and Albert S.; and (2) prosecutorial misconduct deprived him of his state and federal rights to a fair trial and to confront witnesses against him.

¹ All further statutory references are to the Penal Code.

² Counts 2 and 3 for dissuading a witness by force or threat in violation of section 136.1, subdivision (c)(1), were dismissed prior to trial.

FACTS AND PROCEDURAL HISTORY

Viewing the record in the light most favorable to the judgment below as we must (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138–1139), the evidence established the following. On May 10, 2003, around 9:00 p.m., appellant exited a van on the passenger side, walked behind it, and fired at Robles 14 times. Robles suffered 12 bullet wounds and died of his injuries. Appellant is Hispanic. A member of the Evil Klan gang, he goes by the moniker of “Drips.” Jofama Coleman (Coleman), the driver of the van, is a member of Notorious Graffiti Artists (NGA) gang.

Albert S., Sandoval, and Robles were members of the No Control tagging crew, which is a rival to NGA and Evil Klan. Fifteen-year-old Albert S. had known appellant since middle school and had hundreds of negative interactions with him, in which they sometimes cursed at each other and called each other names. Albert S. testified that on May 10, 2003, Albert S., Sandoval, and Robles spent the day together on 101st Street. They saw Coleman driving a white van with appellant in the passenger seat. Later, Robles told the others he was going to a liquor store that happened to be in rival gang territory. Between 8:30 p.m. and 9:00 p.m., Albert S. saw appellant get out of the van and shoot Robles. Albert S. testified that appellant wore a white cotton hoodie sweater, a white beanie, and navy blue jeans or shorts. Sandoval and Albert S. pursued appellant’s van in Sandoval’s car. By the van’s internal light, Albert S. could see Coleman talking to appellant. Appellant came out and pointed a gun at them, so they drove away.

After the shooting, Albert S. feared if he told the truth to police officers, he would be retaliated against. Members of his gang had told him that a driver would not do jail time, so he initially identified Coleman as the driver to police officers only because he believed Coleman would not suffer any consequences. He also told police officers that a man named Willie was the shooter. He believed that Willie would not get into trouble because he did not commit the shooting. Sometime after the shooting, Albert S., his mother, and his new stepfather moved out of the area. His stepfather, a former law enforcement officer, refused to allow him to contact his gang friends. At the time of trial, Albert S. was 19 years old and working as a bail bond agent and a security guard. A year

after the shooting, Albert S. decided to come forward with the truth and in March 2004, told Los Angeles County Sheriff's Department Detective Sergeant Steven Katz that appellant was the shooter.

Sandoval, Robles's father Rodolfo Robles (Rodolfo), and Robles's 14-year-old brother A.R. were unable to identify the shooter. Sandoval, who still lived in the same neighborhood at time of trial, denied ever being a member of No Control, and described the shooter as wearing black pants and a black puffy jacket. Sandoval stated that he did not see the driver. Rodolfo, who ran outside his house when he heard gunshots, identified the driver as Coleman, but did not recognize the shooter, whom he described as a dark-skinned Hispanic male wearing dark-colored pants, a white T-shirt and dark-colored beanie. A.R. testified that he went to the door of a neighbor's house, where he was playing when he heard shots. He saw the shooting, but could not identify the shooter's race, weight, or height.

Gang expert Lennox Station, Los Angeles County Deputy Sheriff Michael Valento testified that members of the No Control gang had recently defaced Evil Klan gang graffiti, giving appellant the motive to fight or shoot members of the No Control gang. Deputy Sheriff Valento and Detective Katz testified that witnesses are frequently fearful of retaliation in gang-related cases and that Albert S. was particularly afraid because his grandmother still lived in the neighborhood. Deputy Sheriff Valento interviewed Albert S. in the presence of his stepfather at their residence, where Albert S. informed him that appellant was the shooter.

On April 5, 2003, Los Angeles County Deputy Sheriff Steven Marella arrested Coleman in a green Toyota Camry in which David Medina (Medina) and Evelyn Medina were passengers. A firearm belonging to Coleman was recovered from the car. At trial, Medina, a former member of the Evil Klan gang, testified that Coleman and his brother Jeremy were Medina's brothers-in-law. He claimed that appellant, appellant's brother Sergio, Coleman, Coleman's brother Jeremy, and Jessie Fujino (Fujino) were not members of the Evil Klan gang. He said he was in prison when his friend Fujino was murdered and he did not know if appellant was present at the murder. Medina testified

that on May 10, 2003, Jeremy said he had been beaten on 102nd Street by members of No Control, one of whom had used a baseball bat. That morning, Coleman and Medina drove around 102nd Street in Coleman's green Toyota, but were unsuccessful in their attempt to find out who beat Jeremy, so they went home. Medina said that Coleman stayed at his house the rest of the day and night.

Defense witness Maria Renteria (Renteria) testified that the shooter was African American. She testified she parked her car about the distance between the witness stand and the courtroom wall, or 35 feet, from the shooter on the same side and just past the Robles's driveway. However, the prosecutor showed her pictures of where her van had been parked that night, depicting it on the opposite side of the Robles's driveway, behind a truck, and about 160 feet away from the shooter. During cross-examination she acknowledged that she was not good at estimating distances, that she was scared, and that she could have been five car lengths from the shooting. On viewing photographs of the crime scene, Detective Katz pointed out that Renteria's van was parked behind three vehicles spaced between driveways, and a large truck.

DISCUSSION

I. There was sufficient evidence that appellant committed the charged crimes

Appellant contends that the evidence was insufficient to support the verdict because no physical evidence connected appellant to the crimes; the witnesses' testimony conflicted; and Albert S.'s testimony was biased and inherently improbable. We disagree.

"The role of an appellate court in reviewing the sufficiency of the evidence is limited. The court must 'review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.] [¶] . . . But it is the *jury*, not the appellate court, which must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] Therefore, an appellate court may not substitute its judgment for that of the jury." (*People v. Ceja, supra*, 4 Cal.4th at pp. 1138–1139.) We

do not reweigh the evidence; even if the circumstances “might reasonably be reconciled with a contrary finding[, this] would not warrant reversal of the judgment.”

(*People v. Proctor* (1992) 4 Cal.4th 499, 529.)

The uncorroborated testimony of a single witness is sufficient to sustain a conviction unless the testimony is physically impossible or inherently improbable. (*People v. Scott* (1978) 21 Cal.3d 284, 296.) Substantial evidence supports the jury’s finding that appellant was both the shooter and the man who assaulted Albert S. and Sandoval with a firearm. Albert S. identified appellant as the shooter in a photographic lineup and at trial. Albert S. had known appellant since middle school, knew his gang moniker, and had hundreds of unpleasant interactions with him. Albert S. testified that he saw appellant and Coleman drive past him and his friends in a white van. Albert S. unequivocally testified that he saw appellant leave the van, walk behind it, and shoot Robles 14 times. After chasing the van, Albert S. testified that he clearly saw appellant get out of the van and point a firearm at him and Sandoval.

Despite the strength of this evidence, appellant urges that there is insufficient evidence to support the findings because no physical evidence connected appellant to the crime. But, Sandoval corroborated Albert S.’s testimony that they were hanging out together when the shooting occurred. Sandoval testified that the shooter got out of the passenger side of a white van, shot Robles and returned to the van. He also corroborated that he and Albert S. followed the white van until it stopped and someone came out to point a gun at them. Rodolfo also confirmed that the driver was Coleman, and that the shooter was a dark-skinned Hispanic male. And, A.R. corroborated the sequence of the shooting. Finally, gang expert Lennox Sheriff’s Department Deputy Sheriff Michael Valento testified that appellant had a motive to fight or shoot members of the No Control gang.

Nor are we convinced by appellant’s argument that Albert S. was biased because he hated appellant and gave inherently improbable testimony. It is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. (*People v. Ochoa* (1993) 6 Cal.4th 1199,

1206.) Deputy Sheriff Valento and Detective Katz testified that witnesses are frequently fearful of retaliation in gang-related cases and that Albert S. was particularly afraid because his grandmother still lived in the neighborhood. Therefore, it is not improbable that when the shooting occurred, Albert S. was fearful of retaliation and he gave Coleman's name to the police because he believed Coleman could not be prosecuted. Similarly, his testimony that he gave Willie's name to the police only because Willie had no involvement and would not be prosecuted, was not improbable. Additionally, Albert S. was very young and still living in the neighborhood when the shooting occurred and the jury could infer that he was fearful of retaliation if he gave appellant's name to the police. Subsequently, he was moved out of the area by his new stepfather, who prohibited him from visiting his old neighborhood and supported him in his later desire to tell the truth.

Appellant also points to discrepancies among the witnesses' testimonies regarding the race, weight, height, and clothing of the shooter, as well as the direction the van headed after the shooting. He urges that the crime had occurred more than four years prior to trial, the observations were made in the dark, and the witnesses had different vantage points. Appellant also speculates on the motivations of the witnesses. He attempts to undermine the probative value of the out-of-court identification and-in court identification by Albert S., whom he claims lacked credibility. Appellant's argument is merely an invitation to reweigh the evidence and assess witness credibility, which we cannot do. (*People v. Proctor, supra*, 4 Cal.4th at p. 529; *People v. Ochoa, supra*, 6 Cal.4th at p. 1206.)

We conclude that sufficient evidence supported the jury's finding that appellant committed the charged crimes.

II. The prosecutor did not commit misconduct

A. Claim of misconduct regarding Renteria

Appellant next claims that the prosecutor committed misconduct during closing argument by arguing facts not in evidence, specifically: (1) that defense witness Renteria

was around 200 feet from the shooting, when she was actually 35 feet from the shooting; and (2) that appellant was present at the murder of a gang member without any basis for the allegation. We conclude that appellant's claims of misconduct were waived by his failure to object; that the prosecutor did not commit misconduct; and that even assuming misconduct, the prosecutor's arguments did not prejudice appellant.

Typically, a defendant may not complain on appeal of prosecutorial misconduct unless he or she makes a timely objection and requests an admonition. (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 427.) The record shows that the prosecutor argued that Renteria was "probably about 200 feet" away from appellant during the shooting. Defense counsel objected on the basis that there was no evidence in the record as to the distance of 200 feet, and the trial court admonished the jury that "there's no evidence in the record exactly how far Miss Renteria was." Defense counsel did not renew his objection or request a different admonition. Thus, he cannot now claim on appeal that the trial court gave incorrect information because Renteria had actually testified that she was as far from the shooter as the witness box to the back wall, which the trial court noted was 35 feet.

Even so, in order to prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood that the jury understood or applied the complained-of comments in an improper or erroneous manner. (*People v. Sanders* (1995) 11 Cal.4th 475, 526.) Appellant contends that the prosecutor misrepresented Renteria's testimony, which was exacerbated by the trial court's admonition that there was no evidence in the record of the exact distance. But the jury was instructed: that statements made by the attorneys during trial are not evidence; how to evaluate the credibility of witnesses; how to weigh inconsistent testimony; and that the burden of proving identity is based solely on eyewitness testimony. Prior to closing arguments, the trial court again admonished the jury that the attorneys' arguments are not evidence, and the final decision as to the facts rests with the jury. We presume the jury

followed these instructions, and defendant has not rebutted this presumption. (*People v. Boyette* (2002) 29 Cal.4th 381, 453.)

Accordingly, we presume the jury realized that both the prosecutor's statement that Renteria was 200 feet away and defense counsel's statement that there was no evidence of the distance, were both arguments. Indeed, the prosecutor is entitled to state deductions and conclusions from the evidence. (*People v. Sanders, supra*, 11 Cal.4th at p. 526.) The prosecutor's argument was supported by: Renteria's testimony that she was not good at estimating distance; Renteria's identification of a photograph depicting the Robles residence between the shooting and where her van was parked; Renteria's testimony that the van was pictured in a different location than she remembered; and Detective Katz's testimony that Renteria's van was much farther than 35 feet away from the shooting because a truck and three cars with driveways between them were between her van and the shooting. Thus, the prosecutor did not commit misconduct in making an argument that was supported by the evidence at trial.

B. Claims of misconduct regarding Fujino

Appellant contends that the prosecutor committed misconduct by stating in closing argument that appellant was present at the murder of Fujino, an Evil Klan gang member. We disagree that the prosecutor's statement constituted misconduct or that the statement resulted in prejudice to appellant.

We first find that appellant waived his claim of prosecutorial misconduct by failing to object at trial, and we reject his claim that such an objection and admonition would merely have highlighted the improper argument. Rather, it is ordinarily presumed that the jury heeded the admonition and the error was cured. (*People v. Green* (1980) 27 Cal.3d 1, 29, abrogated on other grounds as stated in *People v. Martinez* (1999) 20 Cal.4th 225.)

Next, we conclude that there is not a reasonable likelihood that the jury applied the prosecutor's remark in an improper manner. (*People v. Sanders, supra*, 11 Cal.4th at p. 526.) Appellant urges that the statement that he was present at Fujino's murder left the

jury to “speculate as to what type of incident [perhaps a shootout with rival gang members] led to his death and what role appellant played in the incident” But, our review of the prosecutor’s closing argument reveals that, taken in context, the remark was meant to establish that Medina, appellant, Fujino and Coleman were linked together through friendship, marriage, and gang connections. The prosecutor specifically stated: “It’s not going to prove the [appellant] is guilty of murder, but it is a piece of evidence you can use to corroborate [Albert S.]. Ties them all together.” Accordingly, the prosecutor admonished the jury not to speculate that appellant’s link to the other members proved that he was guilty of murder. And, as previously discussed, the jury was fully instructed as to the evidentiary value of the attorneys’ statements; on weighing inconsistent testimony; and on the burden of eyewitness identity.

Even if the prosecutor committed misconduct, we conclude that it is not reasonably probable the jury would have reached a different result absent the challenged comments. (*People v. Sandoval* (1992) 4 Cal.4th 155, 183.) The eyewitness testimony of Albert S., who had known appellant since middle school, was clear and unequivocal. His testimony was corroborated by many witnesses in its essentials. The remarks by the prosecutor were insignificant in light of the strong evidence of guilt.

DISPOSITION

The judgment is affirmed.

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BOREN, P.J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.